cable operator holds an attributable interest from discriminating in the sale of programming to unaffiliated multichannel video programming distributors. A cable operator seeking to induce a programmer in which it holds an ownership interest to act in any manner inconsistent with the programmer's self-interest -- in order to favor the cable operator or to disfavor a cable competitor -- "presumably would face the united opposition" of the other shareholders.

In contrast to the broadcast attribution rules, Section 628 is not primarily concerned with promoting diversity of viewpoint by regulating common ownership of distribution facilities. There can be no doubt that the existing satellite cable and satellite broadcast programming services provide a substantial diversity of viewpoints. See, e.g., Report to Congress, 5 FCC Rcd. 4962, 4992 (1990) ("the number of domestic existing and proposed pay TV and satellite cable services" increased from 67 in 1984 to 181 in 1989). Rather, Section 628 seeks to "foster the development of competition to traditional cable systems" by, among other things, providing "competing multichannel systems" with access to existing "cable programming services." NOPR at ¶1. Thus, the broadcast attribution standard is far too restrictive for the "economic" purpose of promoting competition from alternative media.[4]

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[4] If the Commission nonetheless considers adopting broadcast attribution criteria, it should issue a Further Notice of Proposed Rulemaking in MM Docket No. 92-51 to afford

Further, Section 628 contains complementary statutory protections to ensure the availability of programming to alternative distribution media, thereby promoting competition. "Unfair methods of competition" and "deceptive acts or practices" are broadly prohibited. Further, Section 628(c)(2)(A) requires the Commission to "establish safeguards" to prevent a vertically integrated cable operator from "unduly or improperly influencing" the decisions of an affiliated satellite cable or satellite broadcast programming vendor with respect to sales of programming "to any unaffiliated multichannel video programming distributor." Although regulations adopted by the Commission pursuant to Section 628(c)(2)(A) must permit a cable operator to exercise that level of influence or control commensurate with the voting rights attendant to its ownership interest in the programmer,[5] the statute appears to prohibit the cable operator from exercising influence exceeding its stock or equity ownership in decisions regarding sales of programming to unaffiliated distributors. Consequently, a cable operator holding a minority voting interest

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interested parties an opportunity to comment further on the standards proposed therein because of the application of those standards under Section 628.

[5] This interpretation of Section 628(c)(2)(A) is consistent with the statutory prohibition in Section 628(b) against only "unfair" or "deceptive" practices in that there is nothing inherently unfair or deceptive about exercising control or influence over the affairs of a corporation in accordance with the voting rights attendant to one's ownership interest therein.

in a satellite cable programmer would not have the "ability" by virtue of such ownership to force that programmer to offer less favorable terms to unaffiliated multichannel video programming distributors. Thus, majority control is the appropriate standard.

C. Similarly Targeted Behavioral Attribution Surrogates May Be Appropriate.

Finally, the Commission questions whether it should "establish behavioral guidelines to determine control irrespective of the attribution threshold." NOPR at ¶9. Reasonably limited behavioral guidelines may be appropriate provided that they work both ways, i.e. holders of ownership interests which exceed the attribution levels should be permitted to rely on the behavioral guidelines to demonstrate that they do not exercise control over a particular entity (e.g. non-voting stock, limited partnership interests, or restricted voting rights).

The Commission has "often recognized that there is no exact formula by which 'control' of a broadcast authorization can be determined." Bee Broadcasting Associates, 5 FCC Rcd. 6584, 6586 (1990). Although "the question of control involves an issue of fact" that requires examination of "the specific circumstances presented," the Commission has established certain basic guidelines for its analysis. Id. For example, in cases involving allegations of premature transfer of control, the Commission looks "beyond...legal title" to determine whether a particular party has "the right to determine the basic policies" of the station, particularly with respect to "the station's finances, its personnel, and its programming." Id. Absent these kinds of indicia, there should be no cognizable interest under Section 628.

Regardless of any behavioral standard the Commission may ultimately adopt, its attribution standard should incorporate the single majority shareholder rule and limited partnership exceptions to that rule. Clearly, a cable operator owning stock in a programmer in which a single shareholder controls over 50 percent of the voting stock or otherwise controls a majority of the board of directors cannot control the business decisions of that programmer. Likewise, a limited partnership interest held by a cable operator in a programmer should not be attributable if it satisfies the insulation criteria of Note 2(g)(1) and (2) under Section 73.3555 of the Commission's rules.

In short, an attribution standard of actual control will achieve the primary economic purpose of Section 628. The broadcast attribution standards, which are "unique and require distinct analysis," are unnecessarily restrictive and inappropriate.

III. The Commission Should Develop New Standards For Identifying Discriminatory Conduct Based On Appropriate Principles From Other Statutes.

Section 628(c)(2)(B) requires the Commission to develop regulations to prohibit discrimination "by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms and conditions of sale or delivery" of such programming "among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups." However, the statute does not define what constitutes "discrimination." Consequently, the Commission seeks comment on "objective standards...to distinguish discriminatory behavior -- with respect to pricing or other practices -- from legitimate business behavior that may occur in the video program distribution marketplace." NOPR at ¶15.

The Commission proposes four options for developing objective discrimination standards.[6] The four proposed

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[6] The Commission proposes to enforce the anti-discrimination provisions of Section 628(c)(2)(B) through its formal complaint process. NOPR at ¶16. Specifically, the Commission suggests a "two-step approach for evaluating allegations of discriminatory behavior," pursuant to which the Commission would: (1) examine whether particular price differentials are justifiable; and (2) if not, determine whether the discriminatory practice "has prevent[ed] or hindered significantly any multichannel video programming distributor from providing programming to subscribers." As set forth in Section I, <u>supra</u>, at 4-11 and in this section, a complainant must satisfy both of the "steps" identified by the Commission. However, Liberty respectfully submits that the Commission has reversed

options include: (1) establishment of a rebuttable presumption of non-discrimination for price differentials within a "reasonable region;" (2) standards similar to those used to enforce the common carrier non-discrimination requirements of Section 202; (3) standards based on the Robinson-Patman Act and other antitrust principles; and (4) standards based on "other areas of federal regulation," particularly regulations applicable to antidumping cases in international trade. NOPR at ¶¶19-24.

Satellite cable programming vendors are not common carriers; do not provide tangible goods; and are not involved in international trade proceedings. Consequently, none of the statutory schemes identified by the Commission is directly applicable to programming services, and the Commission should not simply adopt any of these alternatives to evaluate programmers' conduct. Instead, the Commission should fashion a new standard which is based upon certain fundamental principles common to each statutory scheme but which takes into account the unique qualities of programming -- the service at

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the proper order of proof. First, the complainant must prove that a differential exists and that such differential has caused it competitive injury which impeded the distribution of programming. Only then are the justifications for a differential necessary for the Commission's consideration. The Commission should encourage the expeditious resolution of these issues and entertain dispositive motions directed at either "step" at any time in a proceeding.

issue -- and the differences among the providers and consumers of such service.

In developing such standards, the Commission correctly recognizes that it must: (1) take into account "relevant differences between...customers that are necessary to make fair pricing comparisons;" and (2) distinguish between legitimate and discriminatory price differentials. NOPR at ¶25. Likewise, the Commission should exclude from its discrimination rules those pricing disparities which: (1) are not anticompetitive; (2) facilitate broad program distribution; or (3) are responsive to competitive pricing by other programmers.

A. Different Prices, Terms And Conditions For Different Services Are Not Discriminatory.

All of the statutes identified by the Commission as potential bases for developing standards to distinguish between justified and discriminatory price differentials require that the goods or services at issue be substantially alike. Discrimination under Section 202 requires a finding that the communications services are "like." _See_ 47 U.S.C. §202(a); _AT&T Communications_, 5 FCC Rcd. 298, 301 (1990) (the "first step" in Section 202 discrimination cases is to "determine whether the services involved are 'like'"). Likewise, an essential element of discrimination under the Robinson-Patman Act is that the goods involved must be "of like grade and quality." See 15 U.S.C. §13(a). Finally, antidumping cases in international trade involve imports of "like products" to those produced by domestic manufacturers. See 19 U.S.C. §1677(4)(1) (defining "industry" as "the domestic producers as a whole of a like product"). Thus, for a violation of Section 628, the Commission's implementing regulations must require that the services provided to the allegedly favored distributor are "like" those provided to the complainant.

The tests for determining whether goods or services are "like" under each of these statutory schemes are similar. The Commission employs a "functional equivalency test" under Section 202, focusing "on whether one service differs -- either as an objective technical matter, or in terms of customer perception -- in any material functional respect from another." AT&T Communications, 5 FCC Rcd. 298, 301 (1990). Under the Robinson-Patman Act, goods are determined to be "of like grade and quality" only if there is no difference which affects consumer use, preference or marketability. See, e.g., Quaker Oats Co., 66 F.T.C. 1131, 1192 (1964). The "like product" inquiry in international trade cases focuses on whether products are similar "in characteristics and uses," including similarities in "physical appearance and uses, customer perception..., common manufacturing facilities and production employees, and channels of distribution." See 19

U.S.C. §1677(10); Citizen Watch Co., Ltd. v. United States, 733 F. Supp. 383, 389 (Ct. Int'l Trade 1990).

Application of these consistent principles should exclude from the Commission's antidiscrimination regulations instances in which substantially the same programming constitutes different services. For example: (1) regional sports programmers may charge different prices to multichannel video programming distributors in different locations within the region (concentric pricing); and (2) satellite programmers may charge different prices for programming delivered to cable operators as opposed to HSD "distributors."

1. Concentric Pricing Of Regional Sports Networks Promotes Diversity Of Programming And Is Not Discriminatory.

At the outset, the Commission seeks comment on examples of "graduated pricing structure[s]...to facilitate broad program distribution" and "specific situations in which a 'uniform' pricing requirement could reduce the amount of programming available to subscribers." NOPR at ¶15. Regional sports services in which Liberty has an ownership interest use a form of "graduated pricing" to promote broad distribution and would suffer substantially decreased carriage if required to price uniformly regardless of the location of the cable system involved.

Liberty's regional sports networks use a pricing mechanism known as "concentric pricing," based on the theory that cable systems located closer to the "home teams" whose games are featured on each network value that programming more than cable systems located farther away from the "home teams." For example, KBL Sports Network, which features Pittsburgh Penguins hockey, Pirates baseball, and University of Pittsburgh collegiate sporting events, charges more to cable systems located in and around Pittsburgh than it does to cable systems located closer to Philadelphia, where viewer loyalties favor the Philadelphia Flyers, the Phillies and local universities. Nevertheless, fans of the Pittsburgh teams or sports enthusiasts subscribing to many of the cable systems in outlying areas are still able to watch the Pittsburgh teams because KBL obtains carriage by offering its programming to those systems at reduced rates.

This kind of geographic "devaluation" has been upheld against claims of discrimination under the Robinson-Patman Act in the sale of newspapers. Morning Pioneer, Inc. v. Bismarck Tribune Co., 342 F. Supp. 1138, 1141 (D. Minn. 1972), aff'd on other grounds, 493 F.2d 383 (8th Cir. 1974). In that case, a local newspaper established a policy by which it charged lower prices outside the town of publication, reasoning that the paper had a "lesser value to the reader" because it "arrived later, contained less local news, and the bulk of the advertising was of no interest" to the out-of-town reader. 342 F. Supp. at 1141. Although the content of the newspaper was identical, the Court found that, when sold out of town, it was not of "like grade and quality" because out-of-town readers would value it less based on these factors.

The concentric pricing mechanism employed by Liberty's regional sports networks operates on the same premise. Although the content of the programming generally is the same throughout a region,[7] distributors in different areas in the region value the programming differently, with outlying systems generally valuing it less. As a result, the price differentials are neither cost-based nor discriminatory, but are essential to promote broader carriage of the networks -- they expand rather than restrict output. Requiring uniform prices, terms and conditions or limiting price differentials only to cost differences would substantially and irrationally reduce carriage of these networks on cable systems in outlying areas, forcing price increases to the more centrally located systems to offset lost revenues. The net result would be restricted output at higher prices to the detriment of consumers.

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[7] There are some circumstances when the "same" regional sports programming service does not provide identical programming throughout a region because the geographic areas licensed for distribution differ among teams or events.

2. Delivery Of Satellite Programming To Cable Operators Is Not "Like" Delivery Of Satellite Programming To Customers Of HSD "Distributors."

Any regulations adopted by the Commission to implement the antidiscrimination provisions of Section 628 must recognize the substantial differences in technology, operations and other factors between delivering satellite programming to operators of cable and other distribution systems and to customers of HSD "distributors." Cable operators have constructed substantial head-end and distribution facilities which they use to receive and to deliver satellite programming (as well as various other forms of non-satellite programming) to subscribers. In contrast, HSD "distributors" generally neither receive nor deliver the satellite programming to consumers because they have no program distribution facilities of their own. Because of the fundamental differences between cable operators and HSD "distributors" outlined below, the services provided to each are not "like" and, therefore, differences between them cannot support a discrimination claim pursuant to Section 628.[8]

[8] Southern Satellite Systems ("Southern") presented extensive evidence on these issues, including affidavits from two expert witnesses, in a formal complaint proceeding initiated by the National Rural Telecommunications Cooperative ("NRTC"). See Southern's Motion for Judgment in NRTC v. Southern Satellite Systems, File No. E-91-44, dated October 11, 1991 at 17-30 and Exhibits A, B and C. Because those materials include proprietary business information, they were submitted under seal in the NRTC proceeding and are not annexed. However, Liberty refers the Commission to those

(a) Distribution Plant.

Cable operators have made substantial capital investments in head-end facilities and cable distribution plant. Consequently, they receive satellite delivered signals at a single location and distribute those signals and other non-satellite signals from the head-end to individual subscribers. They also are capable of originating a wide variety of local programming, including video and data channels, at the head-end.

In contrast, HSD "distributors" have neither head-ends nor distribution plants. They do not actually deliver any programming to their subscribers. Consequently, instead of delivering a signal to a single receive location, a satellite programmer must deliver its signal directly to each of the subscribers served through the HSD "distributor." For example, Southern Satellite Systems transmits the WTBS signal to only 19,000 cable, SMATV and MMDS head-ends serving over 50 million subscribers, but it must provide a complete transmission path with separate authorizations to each of the approximately 1 million HSD owners receiving WTBS. Moreover, because they have no head-end facilities or distribution plant, the non-satellite programming available for distribution by cable operators is not available to HSD "distribu-

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filings for a full explication of the various technical and operational issues discussed below.

tors." Likewise, an HSD "distributor" does not have the ability to originate programming at the head-end.

(b) Signal Security.

Cable operators deliver programming to subscribers over a secure, hard-wired system and actively police against theft of cable service. In contrast, the Commission has estimated that the incidence of signal piracy by HSD owners is as high as 80 percent.[9] Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 6 FCC Rcd. 3312, 3318 n.57 (1991). Thus, while the programmer is fairly certain to receive payment for each cable subscriber receiving its programming, as few as one out of five HSD owners receiving its programming may actually pay for it.

(c) Separate Authorization Procedures And Equipment.

Satellite programmers use different equipment and procedures to authorize (and deauthorize) cable customers and HSD "distributors" receiving their programming. Cable authorizations typically are done "in-house" using a management computer, channel control computer, and VC-II+ scrambler and the associated equipment to modulate and uplink each sig-

[9] Liberty does anticipate that the rate of theft will decline at least temporarily as a result of the roll-out of the General Instrument VC-II+ encryption system.

nal through an antenna dish to a leased transponder which is in turn downlinked and then descrambled through a dedicated VC-II or VC-II+ (commercial) descrambler at each cable headend. To serve the HSD market, satellite programmers must utilize the separate facilities of the DBS Authorization Center in order to create the separate data stream required for the authorization or deauthorization of each individually addressed home satellite dish and for other HSD-only information. Satellite programmers must pay additional fees for use of the DBS Center and associated equipment.

Through an HSD distributor's own port or an alternative port, authorization information is input into the DBS control computer using the programmer's tier bits. The resulting HSD control stream is communicated from a VSAT dish to a leased satellite transponder to the antenna on the programmer's receiver and then through a data distribution unit to the VC-II+ scrambler and associated equipment noted above. This separate HSD data stream is transmitted with the program signals using the same programming uplink dish to a leased transponder and is in turn downlinked and descrambled by each HSD owner through a separate non-dedicated VC-II+ descrambler.

Delivery of satellite programming signals to cable operators does not require access to the DBS Center or its associated equipment. Thus, the use of the third-party DBS Center requires satellite programmers to incur business risks (opportunity costs) and direct costs not required to serve cable operators. The differences in the service components for cable operator and HSD owner authorizations are consistent with and necessitated by the different transmission functions required of satellite programmers. While the cable operator uses a dedicated descrambler and retransmits the signal to numerous individual subscribers over its transmission system, the satellite carrier must provide the complete transmission and authorization path to each HSD owner regardless of the involvement of an HSD "distributor."

(d) Service Differences For Viewers.

Aside from the differences in operations and equipment used in serving cable operators and HSD "distributors," there also are several differences in the actual signal provided to viewers in each case. For example, because cable operators use dedicated commercial descramblers, only one program definition would be required per day for the data stream provided to cable operators. In contrast, approximately 20 to 35 program definitions are required for the separate data stream used to serve HSD owners. Such program definitions, which include the name of the current program, time remaining, and name of the next program, appear only on the television screens of HSD owners. Similarly, tier include and tier exclude messages are inserted into the separate DBS Center data stream and again displayed only to HSD owners.

Finally, cable operators provide to viewers video signals with analog audio stereo while the video signals provided to HSD viewers include compact disc-like digital audio stereo.

(e) Additional Legal Differences Applicable To Satellite Broadcast Programmers.

In addition to the various service differences described above, Congress has established different legal requirements governing the copyright liability of satellite carrier transmissions of broadcast signals depending upon whether those signals are provided to cable operators or to HSD owners. The differences under copyright law affect the carrier's cost of services to each market.

Satellite carriers act as passive carriers in providing transmission service to cable operators. See Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc., 777 F.2d 393, 402-03 (8th Cir. 1985), cert. denied, 479 U.S. 1005 (1986). Cable operators are subject to the compulsory licensing provisions of the Copyright Act, 17 U.S.C. §111, and must pay the copyright fees for the right to provide satellite-delivered broadcast signals to their subscribers. The satellite carrier incurs no copyright liability in transmitting broadcast signals as a passive carrier to cable operators.

In contrast, satellite carriers do not transmit broadcast signals to HSD "distributors," and those "distributors" do not retransmit signals to their subscribers over any distribution system. The HSD "distributors" are not subject to the compulsory licensing provisions of the Copyright Act. To serve HSD owners, satellite carriers must provide copyrighted programming, for which they are obligated to pay all copyright fees mandated by Section 119(b) of the Copyright Act, 17 U.S.C. §119(b).

Thus, in delivering broadcast signals to cable operators, satellite carriers provide a passive transmission service pursuant to Section 111 of the Copyright Act. In serving customers of HSD "distributors," satellite carriers deliver copyrighted satellite broadcast programming pursuant to Section 119 of the Copyright Act. The two services are fundamentally different as a matter of copyright law and, therefore, are not interchangeable.[10]

(f) The Services Are Not "Like" Under Any Applicable Test.

Application of any of the tests described above compels the conclusion that the provision of satellite programming to cable operators is not "like" the provision of satellite programming to customers of HSD "distributors." The

[10] Congress expressly recognized these differences in enacting the Satellite Home Viewers Act. Satellite carriers provide only "transmission service" to cable operators under "the passive carrier exemption of the Copyright Act," but "[t]he situation changes, however, when these carriers engage in the sale of the programming they transmit" in order to serve HSD owners and distributors. H.R. Rep. No. 887 (II), 100th Cong., 2d Sess. 21 (1988), reprinted in U.S.C.C.A.N. 5638, 5650 (emphasis added).

technical and operational differences described above clearly render the services "unlike" for purposes of Section 202(a). AT&T Communications, 5 FCC Rcd. 298, 301 (1990) (services requiring the use of different switches and software not "like" for purposes of Section 202(a)).

Moreover, the two services are not functionally interchangeable because the single head-end delivery of programming to cable operators is absolutely useless to an HSD "distributor," which lacks any distribution system of its own and functions primarily in the manner of a sales agent. The non-price factors that differentiate the services are neither artificially imposed by nor under the control of the satellite programmers. Rather, these differences satisfy the different communications needs of the respective customers, which arise in part from the differences in their distribution facilities. There simply is no cross-elasticity of demand required to support a finding of "like" services. Ad Hoc Telecommunications Users Comm. v. F.C.C., 680 F.2d 790, 796 n.12 (D.C. Cir. 1982); MCI Telecommunications Corp. v. F.C.C., 917 F.2d 30, 39 (D.C. Cir. 1990) (services are not "like" unless "customers regard[] the...service as the same, with cost considerations being the sole determining criterion"). Because the services provided to cable and HSD customers are not "like," differences in the prices, terms and conditions of service to these customers cannot form the basis of a discrimination claim under Section 628.

B. <u>Antidiscrimination Rules Should Not Prohibit Programmers From Charging Different Prices To Different Classes Of Customers.</u>

The statutory schemes identified by the Commission as potential bases for standards to distinguish between justified and discriminatory price differentials consistently include a requirement that a price discrimination complainant be "similarly situated" with the allegedly favored customer. The antidiscrimination requirement of Section 202 does not prohibit a common carrier from "charging different classifications of customers with different rates." <u>Offshore Tel. Co. v. South Cent. Bell Tel. Co.</u>, 2 FCC Rcd. 4546, 4552 (C.C.B. 1987). Likewise, the Robinson-Patman Act permits "functional discounts" pursuant to which sellers compensate buyers for "expenses incurred by the latter in assuming certain distributive functions." <u>Doubleday & Co.</u>, 52 F.T.C. 169, 207 (1955). Finally, the Commission notes that International Trade Administration procedures in antidumping cases provide for "specific classes of pricing adjustments" based on "circumstances of sale," "volume discounts" and the "level of trade" involved. NOPR at ¶24.

Thus, an essential element of the Commission's implementing regulations, and of any complaint brought thereunder, must be that the customers allegedly receiving disparate treatment in terms of the prices, terms and conditions of sale of satellite programming are "similarly situated."

1. Programmers Must Be Able To Respond To The Needs Of Differently Situated Customers.

Customers of a satellite programmer that are not similarly situated are likely to require different services. As described above, HSD "distributors" generally lack program distribution facilities of their own and, therefore, require programmers to provide different program delivery services than do cable operators. However, the "similarly situated customer" requirement involves competitive considerations beyond simply the nature of the services required to serve different customers.

(a) Cost Differences Among Distributors.

Cable operators and HSD "distributors" incur substantially different capital costs in their respective businesses. Cable operators incur substantial fixed costs to finance and maintain their distribution systems and must spread those fixed costs over all subscribers. HSD "distributors" incur no similar construction or maintenance costs because they have no distribution systems. Clearly, Congress expected considerations of the "cost of creation, sale, delivery or transmission of programming" under Section

628(c)(2)(B)(ii) to include those "costs incurred at the multichannel video programming distributor's level as well as the program vendor's level." <u>See</u> colloquy between Senators Kerry and Inouye, 138 <u>Cong. Rec.</u> S16671 (daily ed. October 5, 1992).

(b) <u>Brokers/Distributors Versus Owners.</u>

A cable operator can commit its system(s) and subscribership to a particular program provider for a contract term, assuring payment based on the subscribers served by its system(s). Typically, an HSD or SMATV "distributor" seeks conditions relieving it from contractual obligations when subscribers or SMATV systems drop the distributor's service during the term of the program contract. Because the guarantee of carriage by an owner/operator is more valuable, a program supplier may justifiably offer more favorable prices, terms and conditions.

(c) <u>Differences In Carriage.</u>

Program suppliers generally are compensated at a per-subscriber rate. Consequently, because the method of carriage (<u>e.g.</u> basic tier, tier, or a la carte) may significantly affect the number of subscribers for which a given rate is paid, programmers may adjust their rates to encourage different methods of carriage. Of course, carriage on basic service ensures the maximum number of subscribers, and programmers may offer a lower rate in exchange for such carriage.

Typically, programmers charge the highest rate for a la carte carriage, which results in lower penetration but higher per-subscriber revenue for the distributor. Thus, multichannel video programming distributors which do not carry a program service in the same manner are not similarly situated.

2. Uniformly Available Volume Discounts Treat Similarly Situated Customers Alike And Are Not Discriminatory.

The Commission and courts have held that even a common carrier may establish reasonable classifications of customers, including volume-based classifications, and charge different prices to customers in different classifications. For example, in Sea-Land Serv., Inc. v. I.C.C., 738 F.2d 1311, 1317 (D.C. Cir. 1984), the Court of Appeals approved contractual "discount rates [based] on guaranteed annual volume shipments," holding that such rates "can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper meeting the contract terms." 738 F.2d at 1317. Because shippers "meeting these volume requirements," and therefore eligible for the contractually discounted rate, "are not similarly situated with other shippers tendering lower volumes of traffic," a carrier "may properly charge different rates for contract and noncontract carriage without running afoul of the prohibition on discriminatory pricing." Id. Citing Sea-Land, the Commission has found that a carrier's "customized offering" is not discriminatory as long as that offering is "available to anyone who might find it useful" because other customers "unwilling or unable to meet the contract terms are not similarly situated." AT&T Communications (Tariff 12), 6 FCC Rcd. 7039, 7051 (1991); Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5897 (1991), on recon., 7 FCC rcd. 2677 (1992).

In its 1990 legislative recommendations to Congress, the Commission expressly stated that, "[i]n our view, bona fide volume discounts would be either cost-based or otherwise applied equally to both affiliated and unaffiliated customers." Report to Congress, 5 FCC Rcd. 4962, 5032 (1990) (emphasis added). Consequently, uniform volume discounts available to all customers -- treating affiliated and unaffiliated customers the same -- are not discriminatory and should be permitted. At the very least, incremental volume discounts, which are structured so that both large and small customers pay the same rate for their "first" subscriber, with fixed discounts available to all customers at incremental volume levels thereafter, should be endorsed as non-discriminatory. Such discounts should be permissible regardless of whether the applicable discount rate corresponds directly to the level of "cost savings...attributable to the number of subscribers served."[11]

3. Restrictive Terms And Conditions Of Service For Unproven Distributors Are Not Discriminatory.

Section 628(c)(2)(B)(i) permits reasonable differentials in the price, terms and conditions of service based on "creditworthiness," "financial stability," "technical quality" and "standards regarding character." Consequently, satellite programmers should be permitted to impose reasonable additional financial requirements and other conditions of service on distributors which: (a) have a poor credit history (or none at all); (b) have a poor history of customer service and satisfaction; and/or (c) employ new distribution technologies, the technical quality of which is unproven.

For example, advance payments or security deposits should be permissible at the discretion of the programmer where a particular distributor or distribution system has been in operation for less than two years or where a longer-term distributor has failed to make payments, made late payments,

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[11] Section 628(c)(2)(B)(iii) provides an explicit exception to the anti-discrimination requirements of the statute for price differentials that "take into account economies of scale, cost savings or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." According to the Conference Report, this provision was adopted "in lieu of" permitting only volume discounts. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992).